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ASPEN COURSEBOOK SERIES

LEGAL REASONING AND LEGAL WRITING

EIGHTH EDITION

Richard K. Neumann, Jr.

Professor of Law
Maurice A. Deane School of Law
at Hofstra University

Ellie Margolis

Professor of Law
Temple University Beasley School
of Law

Kathryn M. Stanchi

Jack E. Feinberg '57 Professor
of Litigation
Temple University Beasley School
of Law



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For

Marjorie Batter Neumann
and in memory of Richard K. Neumann Sr.

— RKN Jr.

Adam, Isaac, and Naomi Guth

— EM

Jeanette M. Stanchi and
in memory of Edward J. Stanchi, Jr.

— KMS

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The power of clear statement is the great power at the bar.

— Daniel Webster
*(also attributed to
Rufus Choate,
Judah P. Benjamin,
and perhaps others)*

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Preface

We created this book to help students learn how to make professional writing decisions — to think simultaneously as lawyers and writers. As we say on page 1, a lawyer’s life is a writer’s life.

Richard K. Neumann, Jr.
Ellie Margolis
Kathryn M. Stanchi

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INTRODUCTION TO LAW

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Legal Writing and Law

§1.1 Legal Writing Is Decisional Writing

Before law school, you probably wrote primarily to communicate information that would satisfy the reader's curiosity. Lawyers write for a different reason — to guide decision-making.

A junior lawyer in a law firm might write an office memorandum to a senior lawyer explaining how the law affects a decision the senior lawyer must make. The memorandum's purpose is to help the senior lawyer make that decision. This is called *objective* or *predictive* writing.

In a courthouse, a lawyer might submit a motion memorandum or an appellate brief to persuade a judge or several judges to decide in favor of the lawyer's client. The document's purpose is to persuade each judge that the client's position is the legally preferable one. This is called *persuasive* writing.

A lawyer's job is to get good results for clients. A lawyer does that by making the right decisions herself and by helping or persuading other people to make the right decisions. In legal writing, your reader — your audience — reads for the purpose of *deciding*.

§1.2 Writing Skills Can Profoundly Affect a Lawyer's Career

A lawyer's life is a writer's life.

To a lawyer, words are professional tools. Everything depends on how well the lawyer uses words — speaking them, interpreting them, and writing them.

Law is “one of the principal literary professions” because “the average lawyer in the course of a lifetime does more writing than a novelist.”¹

Good writing skills are essential to a young lawyer looking for a job. Employers will use your writing sample to confirm that you have those skills. A person who supervised 400 lawyers at a major corporation put it this way: “You are more likely to get good grades in law school if you write well. You are more likely to become a partner in your law firm, or receive comparable promotions in your law department or government law office.”² It really is true that “good writing pays well and bad writing pays badly.”³ Now is the time to learn how to write professionally.

§1.3 Where Law Comes From

Law is primarily rules, which Chapters 2 and 3 explain in detail. Asking where law comes from is the same as asking who makes the rules.

Sources of law can be divided into two categories: one is statutes and statute-like provisions; the other is judge-made law.

Statutes and statute-like materials. Legislatures create rules by enacting statutes. When we say, “There ought to be a law punishing people who text-message while driving,” we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. If the legislature does that, and if the governor approves, the result is a statute. At the federal level, statutes are enacted by Congress with presidential approval. In the first-year of law school, the most statutory courses are Criminal Law (the Model Penal Code) and Contracts (the Uniform Commercial Code).

Statute-like provisions include constitutions, administrative regulations, and court rules. They are not enacted by legislatures, but in some — though not all — ways they are drafted like statutes. In your course on Constitutional Law, you will study the federal constitution. And in your course on Civil Procedure, you will study court rules called the Federal Rules of Civil Procedure.

Judge-made law. Courts record their decisions in judicial opinions, which establish precedents. Under the doctrine of *stare decisis*, those precedents can bind other courts in circumstances explained in Chapter 7. Lawyers

1. William L. Prosser, *English as She Is Wrote*, 7 J. Leg. Educ. 155, 156 (1954).
2. Richard S. Lombard (formerly general counsel at Exxon), remarks reprinted in *Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing*, Occasional Paper 7 of the ABA Section of Legal Educ. Admissions to the Bar, at 54 (1993).
3. Donald N. McCloskey, *The Writing of Economics* 2 (1987).

use the words *cases*, *decisions*, and *opinions* interchangeably to refer to those precedents. Finding them is called *researching the case law*.

Courts make law in two ways. One is by interpreting statutes and statute-like provisions, which can be vague or ambiguous. Often we don't know what a statute means until the courts tell us through the judicial decisions that enforce it. When a court *interprets* the statute, it essentially finishes legislature's job. The other method is by creating and changing the *common law*, which is entirely judge-made, for reasons explained in the next section of this chapter.

§1.4 The Common Law

The past is never dead. It's not even past.

— William Faulkner

Courts originally created the common law through precedent, and they have the power to change it through precedent. Before you arrived in law school, you may not have realized that courts are able to create their own body of law, separate from the law made in legislatures. The idea of law created without legislatures seems so counter-intuitive that it needs explanation.

The common law exists because of events that happened over 900 years ago, with consequences for law-making and legal vocabulary that lawyers still encounter daily. In the autumn of 1066, a French duke named William of Normandy got together an army, crossed the English Channel in boats, invaded England, defeated an English army in the Battle of Hastings, terrorized the rest of the country, and had himself crowned king in London. He then expropriated nearly all the land in England and parceled it out among his Norman followers, who became a new aristocracy. And he set about systematically making English institutions, including law, subservient to his will.

Before the Norman Conquest, English law had differed from one place to another based on local custom. In a village, law had been whatever rules people had followed there for generations. In another village, law might be somewhat different because people there had been following somewhat different rules. Law amounted to traditions reflecting community views on what was right and wrong.

For two reasons, William's royal descendants would not allow this to continue. The political reason was that to complete the Conquest, the monarchy centralized power in itself and eventually created national courts with judges under royal control. The practical reason was that a judge of a national court cannot be expected to know the customary law of each locality. Law had to become uniform everywhere. It had to become *common* to the entire country. This common law could not come from a legislature. The modern concept of a legislature — one that could enact law — did not yet exist.

How was the common law created? The somewhat oversimplified answer is that the judges figured it out for themselves. They started with the few rules that plainly could not be missing from medieval society, and over centuries—faced with new conditions and reasoning by analogy—they discovered other rules of common law, as though each rule had been there from the beginning, but hidden.

Centuries later, British colonists in North America were being governed according to that common law. Their rebellion was not against common law, which they accepted as fair. Their quarrel was instead with the British government and its officeholders. During and after the Revolution, as each colony became a state, it adopted common law as state law. Today, state courts continue to evolve the common law. In your Torts and Contracts courses, you will see examples of this process at work.

Law-passing legislatures—the English Parliament, the U.S. Congress, and state legislatures—were all created centuries *after* the common law began. Today, however, legislatures have the superior law-making power. Common law is still judge-made law. But if a legislature enacts a statute that directly contradicts a common law rule, the statute prevails, and the common law rule ceases to exist. Common law reasoning, however, permeates the practice and study of law.

§1.5 Law's Vocabulary

To a lawyer, words are professional tools, and the law is full of specialized vocabulary, which you will learn to use. Many of law's technical terms aren't from the English language; they're from Latin or from an old dialect called Norman Law French—or just Law French.

Before the Norman Conquest, people in England all spoke a language called Old English. Almost everyone was illiterate. The few people who could read and write tended to do so in Latin because it was a uniform language not broken up into regional dialects. Law had been conducted partly in English but mostly in Latin, and many technical terms in our law are still in Latin. *Stare decisis*, for example, is Latin for “let stand that which has been decided”—in other words, follow earlier decisions, which are precedent.

After the Conquest, government was conducted in Norman French, and law was conducted both in Latin and in Norman Law French, which could still be heard in courtrooms many centuries later. Even today the bailiff's cry that still opens many American court sessions—“Oyez, oyez, oyez!”—is the Norman French equivalent of “Be quiet and listen.”

Law is filled with terms of art that express technical and specialized meanings, and a large proportion of these terms survive from Norman Law French. Some of the more familiar examples include *allegation*, *appeal*, *arrest*, *assault*,

attorney, contract, counsel, court, crime, damages, defendant, evidence, felony, judge, jury, misdemeanor, plaintiff, slander, suit, tenant, tort, and verdict. In the next few months, you'll also encounter *battery, damages, demurrer, devise, easement, estoppel, indictment, lien, livery of seisin, and replevin.*

Some words entered the English language directly from the events of the Conquest itself. In the course on Property, you'll soon become familiar with various types of *fees*: *fee simple absolute, fee simple conditional, fee simple defeasible, fee tail.* These aren't money paid for services. They're forms of property rights, and they're descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country's land among his followers. Even today, these terms appear in the French word order (noun first, modifiers afterward).

Law has a huge vocabulary of technical terms. It is derived from three languages: English, French, and Latin. And law is impossible without its specialized use of words. Medicine is applied biology, and engineering is physics and math. But in law the exact meaning of a word can make the difference between winning a case and losing it.

Use a legal dictionary—either a small book you can carry around with other books or an online legal dictionary if you'd rather work from your laptop. Look up every word that seems like lawyer-talk. But don't stop there. Look up every word or phrase that seems to be used in an unusual way. Some words or phrases obviously have a special meaning to lawyers, such as *parol evidence, habeas corpus, and res ipsa loquitur.* But others are deceptive. They might look like words you've seen many times before, but they mean something different in the law. Examples are *consideration, performance, and remedy.* Look up in a legal dictionary *every word or phrase that seems to be used in an unusual way.*

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Rule-Based Reasoning

§2.1 The Inner Structure of a Rule

At this moment the King, who had for some time been busily writing in his notebook, called out “Silence!” and read from his book, “Rule Forty-two. *All persons more than a mile high to leave the court.*”
Everyone looked at Alice.
“*I’m* not a mile high,” said Alice.
“You are,” said the King.
“Nearly *two* miles high,” added the Queen.

— *Lewis Carroll*,
Alice in Wonderland

Law is made up of rules. A rule is a formula for making a decision.

Every rule has three components: (1) a set of *elements*, collectively called a test; (2) a result that occurs when all the elements are present (and the test is thus satisfied); and (3) a causal term that determines whether the result is mandatory, prohibitory, discretionary, or declaratory. (As you’ll see in a moment, the result and the causal term are usually integrated into the same phrase or clause.) Additionally, many rules have (4) one or more exceptions that, if present, would defeat the result, even if all the elements are present.

Alice was confronted with a test of two elements. The first was the status of being a person, which mattered because at that moment she was in the company of a lot of animals — all of whom seem to have been exempt from any requirement to leave. The second element went to height — specifically

a height of more than a mile. The result would have been a duty to leave the court, because the causal term was mandatory (“*All persons . . . to leave . . .*”). No exceptions were provided for.

Alice has denied the second element (her height), impliedly conceding the first (her personhood). The Queen has offered to prove a height of two miles. What would happen if the Queen were not able to make good on her promise and instead produced evidence showing only a height of 1.241 miles? (Read the rule.) What if the Queen were to produce no evidence and if Alice were to prove that her height was only 0.984 miles? (Read the rule.)

A causal term can be *mandatory*, *prohibitory*, *discretionary*, or *declaratory*. Because the causal term is the heart of the rule, if the causal term is, for example, mandatory, then the whole rule is, too.

A mandatory rule requires someone to act and is expressed in words like “shall” or “must” in the causal term. “Shall” means “has a legal duty to do something.” “The court shall grant the motion” means the court has a legal duty to grant it.

A prohibitory rule is the opposite. It forbids someone to act and is expressed by “shall not,” “may not,” or “must not” in the causal term. “Shall not” means the person has a legal duty *not* to act.

A discretionary rule gives someone the power or authority to do something. That person has discretion to act but is not required to do so. It’s expressed by words like “may” or “has the authority to” in the causal term.

A declaratory rule simply states (declares) that something is true. That might not seem like much of a rule, but you’re already familiar with declaratory rules and their consequences. For example: “A person who drives faster than the posted speed limit is guilty of speeding.” Because of that declaration, a police officer can give you a ticket if you speed, a court can sentence you to a fine, and your state’s motor vehicle department can impose points on your driver’s license. A declaratory rule places a label on a set of facts (the elements). Often the declaration is expressed by the word “is” in the causal term. But other words could be used there instead. And some rules with “is” in the causal term aren’t declaratory. You have to look at what the rule *does*. If it simply states that something is true, it’s declaratory. If it does more than that, it’s something else.

Below are examples of all these types of rules. The examples come from the Federal Rules of Civil Procedure, and you’ll study them later in the course on Civil Procedure. (Rules of law are found not just in places like the Federal Rules. In law, they are everywhere—in statutes, constitutions, regulations, and judicial precedents.)

If the rules below seem hard to understand at first, don’t be discouraged. In a moment, you’ll learn a method for taking rules like these apart to find their meaning. For now, just read them to get a sense of how the four kinds of rules

differ from each other. The key words in the causal terms have been italicized to highlight the differences.

- mandatory:** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court *must* impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.¹
- prohibitory:** The court *must not* require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies, or on an appeal directed by a department of the federal government.²
- discretionary:** The court *may* assert jurisdiction over property if authorized by a federal statute.³
- declaratory:** A civil action *is* commenced by filing a complaint with the court.⁴

Here's a three-step method of figuring out what a rule means:

Step 1: Break the rule down into its parts. List and number the elements in the test. (An element in a test is something that must be present for the rule to operate.) Identify the causal term and the result. If there's an exception, identify it. If the exception has more than one element, list and number them as well. (Exceptions can have elements, too; an exception's element is something that must be present for the exception to operate.) In Step 1, *you don't care what the words mean*. You only want to know the *structure* of the rule. You're breaking the rule down into parts small enough to understand. Let's take the mandatory rule above and run it through Step 1. Here's the rule diagrammed:

1. Rule 4(d)(2) of the Federal Rules of Civil Procedure.
2. Rule 62(e) of the Federal Rules of Civil Procedure.
3. Rule 4(n)(1) of the Federal Rules of Civil Procedure.
4. Rule 3 of the Federal Rules of Civil Procedure.

elements in the test:

If

1. a defendant
2. located within the United States
3. fails to sign and return a waiver
4. requested by a plaintiff
5. located within the United States,

causal term:

the court must

result:

impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

exception:

unless the defendant has good cause for the failure.

You don't need to lay out the rule exactly this way — and you certainly don't need to use boxes. You can use any method of diagramming that breaks up the rule so you can understand it. The point is to break the rule up visually so that it's no longer a blur of words and so you can *see separately* the elements in the test, the causal term, the result, and any exception. When can you combine the causal term and the result? You can do it whenever doing so does not confuse you. If you can understand what's in the box below, you can combine, at least with this rule:

causal term and result:

the court must impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

Step 2: Look at each of those small parts separately. Figure out the *meaning* of each element, the causal term, the result, and any exception. Look up the words in a legal dictionary, and read other material your teacher has assigned until you know what each word means. You already know what a plaintiff and a defendant are. Find the word *service* in a legal dictionary and read the definition carefully. Do it now. After reading the definition, look again at the “result” box above. What does the phrase “the expenses later incurred in making service” mean there?

If you read other material surrounding this rule in Civil Procedure, you'll learn that a request for a waiver is a plaintiff's request that the defendant accept service by mail and *waive* (give up the right to) service by someone who personally brings the papers to the defendant. The surrounding materials also tell you that the expenses of service are whatever the plaintiff has to pay to have someone hired for the purpose of delivering the papers personally to the defendant.

Step 3: Put the rule back together in a way that helps you *use* it. Sometimes that means rearranging the rule so that it's easier to understand. If when you first read the rule, an exception came at the beginning and the elements came last, rearrange the rule so the elements come first and the exception last. It will be easier to understand that way. For many rules — though not all of them — the rule's inner logic works like this:

What events or circumstances set the rule into operation?
(*These are the test's elements.*)

When all the elements are present, what happens?
(*The causal term and the result tell us.*)

Even if all the elements are present, could anything prevent the result?
(*An exception, if the rule has any.*)

Usually, you can put the rule back together by creating a flowchart and trying out the rule on some hypothetical facts to see how the rule works. A flowchart

is essentially a list of questions. You'll be able to make a flowchart because of the diagramming you did earlier in Step 1. Diagramming the rule not only breaks it down so that it can be understood, but it also permits putting the rule back together so that it's easier to apply. The flowchart below comes straight out of the diagram in Step 1 above. (When you gain more experience at this, it will go so quickly and seamlessly that Steps 1, 2, and 3 *will seem to merge into a single step*.) Assume that Keisha wants Raymond to pay the costs of service.

elements:

1. Is Raymond a defendant?
2. Is Raymond located within the United States?
3. Did Raymond fail to comply with a request for waiver?
4. Is Keisha a plaintiff who made that request?
5. Is Keisha located within the United States?

If the answers to all these questions are yes, the court must impose the costs subsequently incurred in effecting service on Raymond—but only if the answer to the question below is no.

exception:

Does Raymond have good cause for his failure to comply?

Step 3 helps you add everything up to see what happens when the rule is applied to a given set of facts. If all the elements are present in the facts, the court must order the defendant to reimburse the plaintiff for whatever the plaintiff had to pay to have someone hired for the purpose of delivering the papers personally to the defendant—unless good cause is shown.

The elements don't have to come first. If you have a simple causal term and result, a long list of elements, and no exceptions, you can list the elements last. For example:

Common law burglary is committed by breaking and entering the dwelling of another in the nighttime with intent to commit a felony inside.⁵

How do you determine how many elements are in a rule? Think of each element as an integral fact, the absence of which would prevent the rule's operation. Then explore the logic behind the rule's words. If you can think of a reasonably predictable scenario in which part of what you believe to be one element could be true but part not true, then you have inadvertently combined

5. This was the crime at common law. It does a good job of illustrating several different things about rule structure. But the definition of burglary in a modern criminal code will differ.

two or more elements. For example, is “the dwelling of another” one element or two? A person might be guilty of some other crime, but he is not guilty of common law burglary when he breaks and enters the *restaurant of another*, even in the nighttime and with intent to commit a felony inside. The same is true when he breaks and enters *his own* dwelling. In each instance, part of the element is present and part missing. “The dwelling of another” thus includes two factual integers — the nature of the building and the identity of its resident — and therefore two elements.

Often you cannot know the number of elements in a rule until you have consulted the precedents interpreting it. Is “breaking and entering” one element or two? The precedents define “breaking” in this sense as the creation of a gap in a building’s protective enclosure, such as by opening a door, even where the door was left unlocked and the building is thus not damaged. The cases further define “entering” for this purpose as placing inside the dwelling any part of oneself or any object under one’s control, such as a crowbar.

Can a person “break” without “entering”? A would-be burglar would seem to have done so where she has opened a window by pushing it up from the outside, and where, before proceeding further, she has been apprehended by an alert police officer — a moment before she can “enter.” “Breaking” and “entering” are therefore two elements, but you could not know for sure without discovering precisely how the courts have defined the terms used.

Where the elements are complex or ambiguous, enumeration may add clarity to the list:

Common law burglary is committed by (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony inside.

Instead of elements, some rules have *factors*, which operate as criteria or guidelines. These tend to be rules empowering a court or other authority to make discretionary decisions, and the factors define the scope of the decision-maker’s discretion. The criteria might be few (“a court may extend the time to answer for good cause shown”), or they might be many (like the following, from a typical statute providing for a court to terminate a parent’s legal relationship with a child).

In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child. . . . For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

(1) Any suitable permanent custody arrangement with a relative of the child. . . .

(2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.

(3) The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home.

(4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

(5) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

(6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

(7) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(9) The depth of the relationship existing between the child and the present custodian.

(10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(11) The recommendations for the child provided by the child's guardian ad litem or legal representative.⁶

Only seldom would all of these factors tip in the same direction. With a rule like this, a judge does something of a balancing test, deciding according to the tilt of the factors as a whole, together with the angle of the tilt.

Factors rules are a relatively new development in the law and grow out of a recent tendency to define more precisely the discretion of judges and other officials. But the more common rule structure is still that of a set of elements, the presence of which leads to a particular result in the absence of an exception.

6. Fla. Stat. § 39.810 (2006).

§2.2 Organizing the Application of a Rule

Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is listening to a Black Keys album with his new four-foot concert speakers. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of common law burglary?

You probably said “no,” and your reasoning probably went something like this: “That’s not burglary. Burglary happens when somebody gets into the house when you’re not around and steals all the valuables. Maybe this will turn out to be some kind of trespass.” But in law school a satisfactory answer is never merely “yes” or “no.” An answer necessarily includes a sound *reason*, and, regardless of whether Welty is guilty of burglary, this answer is wrong because the reasoning is wrong. The answer can be determined only by applying a rule like the definition of common law burglary found earlier in this chapter. *Anything else is a guess.*

Where do you start? Remember that a rule is a structured idea: The presence of all the elements causes the result, and the absence of any of them causes the rule not to operate. Assume that in our jurisdiction the elements of burglary are what they were at common law:

1. a breaking
2. and an entry
3. of the dwelling
4. of another
5. in the nighttime
6. with intent to commit a felony inside

To discover whether each element is present in the facts, simply annotate the list:

1. *a breaking*: If a breaking can be the enlarging of an opening between the door and the jam without permission, and if Lutz's actions do not imply permission, there was a breaking.
2. *and an entry*: Welty “entered,” for the purposes of the rule on burglary, by walking into the room, unless Lutz's actions implied permission to enter.
3. *of the dwelling*: Lutz's apartment is a dwelling.

4. *of another*: And it is not Welty's dwelling; she lives down the hall.
5. *in the nighttime*: Midnight is in the nighttime.
6. *with intent to commit a felony inside*: Did Welty intend to assault Lutz when she strode through the door? If not, this element is missing.

Now it's clear how much the first answer ("it doesn't sound like burglary") was a guess. By examining each element separately, you find that elements 3, 4, and 5 are present, but that you're not sure about the others without some hard thinking about the facts and without consulting the precedents in this jurisdiction that have interpreted elements 1, 2, and 6.

The case law might turn up a variety of results. Suppose that, although local precedent defines Welty's actions as a breaking and an entry, the cases on the sixth element strictly require corroborative evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had told someone that he intended to murder the occupant. Against that background, the answer here might be something like the following: "Welty is not guilty of burglary because, although she broke and entered the dwelling of another in the nighttime, there's no evidence that she had a felonious intent when entering the dwelling."

Suppose, on the other hand, that under local case law Welty's actions again are a breaking and an entry; that the local cases don't require corroborative evidence of a felonious intent; and that local precedent defines a felonious intent for the purposes of burglary to be one that the defendant could have been forming—even if not yet consciously—when entering the dwelling. Under those sub-rules, if you believe that Welty had the requisite felonious intent, your answer would be something like this: "Welty is guilty of burglary because she broke and entered the dwelling of another in the nighttime with intent to commit a felony inside, thus meeting all the elements of common law burglary."

These are real answers to the question of whether Welty is guilty of burglary. They state not only the result, but also the reason why.

§2.3 Some Things to Be Careful About with Rules

A rule might be expressed in any of a number of ways. Where law is made through precedent—as much of our law is—different judges, writing in varying circumstances, may enunciate what seems like the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have spoken of the same rule in different voices or instead have spoken of slightly

different rules. In either situation, it can be harder still to discover — because of the variety — exactly what the rule is or what the rules are.

Ambiguity and vagueness can obscure meaning unless the person stating the rule is particularly careful with language. The classic example asks whether a person riding a bicycle or a skateboard through a park violates a rule prohibiting the use there of “vehicles.” What had the rule-maker intended? How could the intention have been made more clear?

A rule usually doesn’t express its purpose — or, as lawyers say, the policy underlying the rule. A rule’s policy or purpose is the key to unravelling ambiguities. Is a self-propelled lawn mower a prohibited “vehicle”? Try to imagine what the rule-makers were trying to accomplish. Why did they create this rule? What harm were they trying to prevent, or what good were they trying to promote?

Not only is it difficult to frame a rule so that it controls all that the rule-maker wishes to control, but once a rule has been framed, situations will inevitably crop up that the rule-maker didn’t contemplate or couldn’t have been expected to contemplate. Would a baby carriage powered by solar batteries be a “vehicle”?

Finally, the parts of a rule may be so complex that it may be hard to pin down exactly what the rule is and how it works. And this is compounded by interaction between and among rules. A word or phrase in one rule may be defined, for example, by another rule. Or the application of one rule may be governed by yet another rule — or even a whole body of rules.

Two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an “ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word . . . and to analyze and elucidate class words and abstractions.”⁷

The second is the capacity to *think structurally*. A rule is a structured idea, and the rule’s structure is more like an algebraic formula than a value judgment. You need to be able to figure out an idea’s structure and apply it to facts.

§2.4 Causes of Action and Affirmative Defenses

The law cannot remedy every wrong. Many problems are more effectively resolved through other means, such as the political process, mediation, bargaining, and economic and social pressure. Unless the legal system focuses its resources on resolving those problems it handles best, it would collapse under the weight of an unmanageable workload and would thus be prevented from attempting even the problem-solving it does well.

7. William L. Twining & David Miers, *How to Do Things with Rules* 120 (1976).

A harm the law will remedy is called a *cause of action* (or, in some courts, a *claim*). If a plaintiff proves a cause of action, a court will order a remedy unless the defendant proves an *affirmative defense*. If the defendant proves an affirmative defense, the plaintiff will get no remedy, even if that plaintiff has proved a cause of action. Causes of action and affirmative defenses (like other legal rules) are formulated as tests with elements and the other components, as explained in §2.1.

For example, where a plaintiff proves that a defendant intentionally confined him and that the defendant was not a law enforcement officer acting within the scope of an authority to arrest, the plaintiff has proved a cause of action called *false imprisonment*. The test is expressed as a list of elements: “False imprisonment consists of (1) a confinement (2) of the plaintiff (3) by the defendant (4) intentionally (5) where the defendant is not a sworn law enforcement officer acting within that authority.” Proof of false imprisonment would customarily result in a court’s awarding a remedy called *damages*, which obliges the defendant to compensate the plaintiff in money for the latter’s injuries.

But that isn’t always so: If the defendant can prove that she caught the plaintiff shoplifting in her store and restrained him only until the police arrived, she might have an affirmative defense that is sometimes called a *shopkeeper’s privilege*. Where a defendant proves a shopkeeper’s privilege, a court will not award the plaintiff damages, even if he has proved false imprisonment. The affirmative defense has its list of elements: “A shop-keeper’s privilege exists where (1) a shopkeeper or shopkeeper’s employee (2) has reasonable cause to believe that (3) the plaintiff (4) has shoplifted (5) in the shopkeeper’s place of business and (6) the confinement occurs in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes.”

Notice that some elements encompass physical activity (“a confinement”), while others specify *states of mind* (“intentionally”) or address status or condition (“a shopkeeper or shopkeeper’s employee”) or require *abstract qualities* (“in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes”). State-of-mind and abstract-quality elements will probably puzzle you more than others will.

How will the plaintiff be able to prove that the defendant acted “intentionally,” and how will the defendant be able to show that she confined the plaintiff “in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes”? Because thoughts and abstractions cannot be seen, heard, or felt, the law must judge an abstraction or a party’s state of mind from the actions and other events surrounding it. If, for example, the plaintiff can prove that the defendant took him by the arm, pulled him into a room, and then locked the door

herself, he may be able — through inference — to carry his burden of showing that she acted “intentionally.” And through other inferences, the defendant may be able to carry her burden of proving the confinement to have been reasonably carried out if she can show that when she took the defendant by the arm, he had been trying to run from the store; that she called the police immediately; and that she turned the defendant over to the police as soon as they arrived.

Exercise
Rule 11 of the Federal Rules of
Civil Procedure

Provisions from Rule 11 appear below. For each provision, decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flow-chart showing the questions that would need to be answered to determine when a court must strike a paper.

- | | |
|--------------------|--|
| Provision A | The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney’s or party’s attention. |
| Provision B | If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. |
| Provision C | Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. |
| Provision D | This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37. |

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Issues, Facts, Precedents, and Statutes

§3.1 A Precedents' Anatomy

An opinion announcing a court's decision — also called a *precedent* or, most commonly, a *case* — can include up to nine ingredients:

1. a description of procedural events (what lawyers and judges did before the decision was made)
2. a narrative of pleaded or evidentiary events (what the witnesses saw and the parties did *before* the lawsuit began)
3. a statement of the issue or issues to be decided by the court
4. a summary of the arguments made by each side
5. the court's holding on each issue
6. the rule or rules of law the court enforces through each holding
7. the court's reasoning
8. dicta
9. a statement of the relief granted or denied

Most opinions don't include all these things, although a typical opinion probably has most of them. Let's look at each.

Opinions often begin with (1) a recitation of *procedural events* during the litigation that have raised the issue decided by the court. Examples are motions, hearings, trial, judgment, and appeal. Although the court's description of these events may — because of unfamiliar terminology — seem at first confusing, you must be able to understand them because the manner in which an issue is raised determines the method a court will use to decide it. A court

decides a motion for a directed verdict, for example, very differently from the way it rules on a request for a jury instruction, even though both might require the court to consider the same point of law. The procedural events add up to the case's *procedural posture* at the time the decision was made.

Frequently, the court will next describe (2) the *pleaded events* or the *evidentiary events* on which the ruling is based. In litigation, parties allege facts in a pleading and then prove them with evidence. The court has no other way of knowing what transpired between the parties before the lawsuit began. A party's pleadings and evidence tell a story that favors that party. The other party's pleadings and evidence tell a different and contrary story.

As you read the court's description of the pleadings and evidence, you can often tell, even before reading the rest of the opinion, which party's story persuaded the court. Stories persuade. Usually the court tells you, the reader, the same story that the winning lawyer told the court. An effective lawyer can tell an effective story and tell it well through pleadings or evidence or both.

A court might also set out (3) a statement of the *issue or issues* before the court for decision and (4) a *summary of the arguments* made by each side, although either or both are often only implied. A court will further state, or at least imply, (5) the *holding* on each of the issues and (6) the *rule or rules of law* the court enforces in making each holding, together with (7) the *reasoning behind* — often called the *rationale for* — its decision. Somewhere in the opinion, the court might place some (8) *dicta*. You'll learn more about dicta in the next few months, but for the moment think of it as discussion unnecessary to support a holding and therefore not mandatory precedential authority.

An opinion usually ends with (9) a *statement of the relief granted or denied*. If the opinion is the decision of an appellate court, the relief may be an affirmation, a reversal, or a reversal combined with a direction to the trial court to proceed in a specified manner. If the opinion is from a trial court, the relief is most commonly the granting or denial of a motion.

An opinion announcing a court's decision is called *the court's opinion* or *the majority opinion*. If one or more of the judges involved in the decision don't agree with some aspect of the decision, the opinion might be accompanied by one or more *concurrences* or *dissents*. A concurring judge agrees with the result the majority reached but would have used different reasoning to justify that result. A dissenting judge disagrees with both the result and the reasoning.

Concurrences and dissents are themselves opinions, but they represent the views only of the judges who are concurring or dissenting. Because concurrences and dissents are opinions, they contain some of the elements of a court's opinion. A concurring or dissenting judge might, for example, describe procedural events, narrate pleaded or evidentiary events, state issues, summarize arguments, and explain reasoning.

Be an active and engaged reader. Most people read passively most of the time—breezing through paragraphs, understanding some or most of what’s on the page and guessing about the rest. Lawyers don’t read cases and statutes that way. You cannot succeed in law school by reading passively.

Active and engaged reading includes pulling apart, in your mind, what’s on the page and wringing meaning out of it. Consciously or unconsciously, active readers have silent dialogs with themselves about what they’re reading. They ask themselves questions, which they try to answer while reading. For example:

“Why is the judge emphasizing this fact?”

(This is active reading. A passive reader isn’t curious.)

“What does that phrase mean? How can I find out?”

(A passive reader will skim over the phrase without trying to understand it.)

“What’s preventing me from understanding that paragraph?”

(A passive reader will give up and ignore the paragraph.)

Who’s in charge—the reader or the page? For a passive reader, the page is in charge because the passive reader lets words hide their meaning. An active reader won’t allow words to do that. An active reader silently interrogates until the words surrender and confess what they mean.

Exercise I

Dissecting the Text of *Roberson v. Rochester Folding Box Co.*

Read *Roberson v. Rochester Folding Box Co.* below and determine where (if anywhere) each ingredient occurs. Mark up the text generously and be prepared to discuss your analysis in class. Look up in a legal dictionary every unfamiliar word as well as every familiar word that is used in an unfamiliar way.

The majority opinion in *Roberson* discusses—and disagrees with—one of the most influential articles ever published in an American law review: Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Law reviews are periodicals that publish articles analyzing legal questions in scholarly depth. Almost every law review is sponsored by a law school and edited by students.

Like the cases reprinted in your casebooks for other courses, the version of *Roberson* printed here has been edited extensively to make it more readable. In casebooks and in other legal writing, certain customs are observed when quoted material is edited. Where words have been deleted, you’ll see ellipses (strings of three or four periods). Where words have been added, usually to substitute for deleted words, the new words will be in brackets (squared-off parentheses).

ROBERSON v. ROCHESTER FOLDING BOX CO.

64 N.E. 442 (N.Y. 1902)

PARKER, Ch. J. [The defendant demurred] to the complaint . . . upon the ground that the complaint does not state facts sufficient to constitute a cause of action. [The courts below overruled the demurrer.]

[We must decide] whether the complaint . . . can be said to show any right to relief either in law or in equity. [We hold that it does not show any right to relief.]

The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged . . . in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff . . . ; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters, "Rochester Folding Box Co., Rochester, N.Y."; that upon the same sheet were other advertisements of the flour of the Franklin Mills Co.; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places; that they have been recognized by friends of the plaintiff and other people with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind. . . .

[The] portrait . . . is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment . . . implied in the selection of the picture for such purposes; but as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of \$15,000.

There is no precedent for such an action to be found in the decisions of this court. . . . Nevertheless, [the court below] reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy"—in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was [theorized] in the Harvard Law Review . . . in an article entitled, "The Right of Privacy."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. . . .

If such a principle be incorporated into the body of the law through the [process of judicial precedent], the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established [through judicial precedent], cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. [Thus, a] vast field of litigation . . . would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event, no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are . . . necessarily [constrained] by precedents. . . .

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity [because] the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the Harvard Law Review — already referred to — in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that — notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction — in reality such prevention was due to the necessity of affording protection to . . . an inviolate personality, not that of private property. . . .

. . . Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is *Prince Albert v. Strange* (1 Macn. & G. 25; 2 De G. & S. 652). The queen and the prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both

exhibition and catalogue, and the vice-chancellor granted it, restraining defendant from publishing . . . a description of the etchings. [The] vice-chancellor . . . found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property. . . .

[In similar ways, the other English cases cited in the Harvard article do not actually support a common law cause of action for invasion of privacy.] In not one of [them] was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect. . . .

[Of the American cases offered in support of a common law right to privacy, none actually does so when the decisions are examined in detail.] An examination of the authorities [thus] leads us to the conclusion that the so-called “right of privacy” has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. [Thus, there is no common law right of privacy in New York.]

The judgment of the Appellate Division and of the Special Term [is] reversed. . . .

GRAY, J. (dissenting). . . . These defendants stand before the court, admitting that they have made, published and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses and saloons, in the vicinity of the plaintiff’s residence and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her . . . and, yet, claiming that she makes out no cause of action

Our consideration of the question thus presented has not been fore-closed by the decision in *Schuyler v. Curtis*, (147 N.Y. 434). In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, . . . conspicuous in her lifetime for her philanthropic work, to typify “Woman as the Philanthropist” and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the “Representative Reformer.” The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, . . . or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler’s memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been, in that respect, it died

with her. The existence of the individual's right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted," Judge Peckham observed, when delivering the opinion of the court, "that courts have power, in some cases, to enjoin the doing of an act, where the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, *even though the existence of no property*, as that term is usually used, *is involved in the subject*." . . .

[The majority misinterprets both the English and the American precedents.] Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases . . . ; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of . . . legal principles. . . . I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. . . . It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. . . . I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face, or her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public. . . .

O'BRIEN, CULLEN and WERNER, JJ., concur with PARKER, Ch. J.; BARTLETT and HAIGHT, JJ., concur with GRAY, J.

A decision's *citation* is made up of the case's name, references to the reporter or reporters in which the decision was printed, the name of the court where the decision was made, and the year of the decision. For *Roberson*, all this information appears in the heading on page 26.

The case name is composed by separating the last names of the parties with a "v." If the opinion was written by a trial court, the name of the plaintiff

appears first. In some appellate courts, the name of the appellant comes first, but in others the parties are listed as they were in the trial court. In a case with multiple plaintiffs or defendants, the name of only the first listed per side appears in the case name. That's why the *Roberson* opinion mentions two defendants, but only one appears in the case name.

In Torts casebooks, *Roberson* is often used as an example of how the law makes false starts as it grows. The 1890 Harvard Law Review article to which Judge Parker refers is probably the most famous law review article in history.¹ It was written by Louis Brandeis, who was later appointed to the U.S. Supreme Court, and Samuel Warren, who was Brandeis's law partner at the time the article was published. Brandeis and Warren argued that the common law should recognize a new cause of action for tortious invasion of privacy. In *Roberson*, the New York Court of Appeals refused to do so. But eventually courts in other states — virtually all of them after *Roberson* — did adopt Brandeis and Warren's cause of action.

Facts typically make the case, and the *Roberson* facts illustrate why Brandeis and Warren were right. A large company used an 18-year-old girl's photograph in advertising without her permission and without offering to compensate her with the kind of fee that models are paid today. She was a private person who didn't want that kind of publicity. She felt used — which she had been. Even if the Court of Appeals wasn't moved by her story, the public certainly was, and the New York legislature enacted a statute specifically written to overrule the Court's decision.

Despite that statute, *Roberson* is some respects still the law in New York. The reasons are explained, with the statute, later in this chapter.

In 1904, two years after *Roberson*, Judge Alton Parker, author of the majority opinion, ran for president of the United States. He lost in a landslide to the incumbent, Theodore Roosevelt. During the campaign, Parker complained that newspaper photographers often took his picture while he was slouching or looking otherwise unpresidential, and that his family had lost their privacy because they were so frequently photographed. He demanded that photographers stop.

When Abigail Roberson learned of this, she wrote a letter to Parker sarcastically pointing out that “you have no such right as that which you assert. I have very high authority for my statement, being nothing less than a decision of the Court of Appeals of this State wherein you wrote the prevailing opinion [and] I was the plaintiff.”² She was 21 years old when she wrote the letter, and it was printed on the front page of the *New York Times*.

1. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

2. *Parker Taken to Task by Indignant Woman; If I Can Be Photographed, Why Not You Asks Miss Roberson; Quotes His Own Decision*, N.Y. Times, July 26, 1904.

§3.2 The Interdependence of Facts, Issues, and Rules

Many facts are in an opinion only to provide background, continuity, or what journalists call “human interest” to what would otherwise be a tedious and disjointed recitation. Of the remaining facts, some are merely related to the court’s thinking, while others *caused* the court to come to its decision. This last group could be called the *determinative facts* or the *essential facts*. They are essential to the court’s decision because they determined the outcome. If they had been different, the decision would have been different.

The determinative facts lead to the rule of the case—the rule of law for which the case stands as precedent. The most important goal of case analysis is discovering and understanding that rule. Where several issues are raised together in a case, the court must make several rulings and an opinion may thus stand for several rules.

Identify determinative facts by asking the following question: *If a particular fact had not happened, or if it had happened differently, would the court have made a different decision?* If so, that fact is one of the determinative facts. This can be illustrated through a nonjudicial decision of a sort with which you might recently have had some experience. Assume that a rental agent has just shown you an apartment and that the following facts are true:

- A. The apartment is located half a mile from the law school.
- B. It’s a studio apartment (one room plus a kitchenette and bathroom).
- C. The building appears to be well maintained and safe.
- D. The apartment is on the third floor, away from the street, and the neighbors do not appear to be disagreeable.
- E. The rent is \$500 per month, furnished.
- F. The landlord will require a year’s lease, and if you don’t stay in the apartment for the full year, subleasing it to someone else would be difficult.
- G. You have a widowed aunt, with whom you get along well and who lives alone in a house 45 minutes by bus from the law school, and she has offered to let you use the second floor of her house during the school year. The house and neighborhood are safe and quiet, and the living arrangements would be satisfactory to you.
- H. You have made a commitment to work next summer in El Paso.
- I. You neither own nor have access to a car.
- J. Reliable local people have told you that you probably won’t find an apartment that is better, cheaper, or more convenient than the one you’ve just inspected.

Which facts are essential to your decision? If the apartment had been two miles from the law school (rather than a half-mile), would your decision be different? If the answer is no, the first listed fact couldn’t be determinative. It might be part

of the factual mosaic and might explain why you looked at the apartment in the first place, but you wouldn't base your decision on it. (Go through the listed facts and mark in the margin whether each would determine your decision.)

Facts recited specifically in an opinion can sometimes be reformulated generically. In the hypothetical above, for example, a generic restatement of fact *G* might be the following: "You have a rent-free alternative to the apartment, but the alternative would require 45 minutes of travel each way plus the expense of public transportation." This formulation is generic because it would cover other possibilities that would have the same effect. It could include, for example, the following, seemingly different, facts: "You're a member of the clergy in a religion that has given you a leave of absence to attend law school; you may continue to live rent-free in the satisfactory quarters your religion has provided, but to get to the law school, you will have to walk 15 minutes and then ride a subway for 30 minutes more, at the same cost as a bus."

A rule of law is a principle that governs how a particular type of decision is to be made — or, put another way, how certain types of facts are to be treated by the official (such as a judge) who must make a decision. Where a court ambiguously states a rule, you might arrive at an arguably supportable formulation of the rule by considering the determinative facts to have caused the result. There's room for interpretive maneuvering wherever you could reasonably interpret the determinative facts narrowly (specifically) or broadly (generically).

Notice how different formulations of a rule can be extracted from the apartment example. A narrow formulation might be the following:

A law student who has a choice between renting an apartment and living in the second floor of an aunt's house should choose the aunt's house where the apartment's rent is \$500 per month but the aunt's second floor is free except for bus fares; where the student must work in El Paso during the summer; and where it would be difficult to sublease the apartment during the summer.

Because this formulation is limited to the specific facts given in the hypothetical, it could directly govern only a tiny number of future decision-makers. It would not, for example, directly govern the member of the clergy described above, even if she will spend next summer doing relief work in Rwanda.

Although a decision-maker in a future situation might be able to reason by analogy from the narrow rule set out above, a broader, more widely applicable formulation, stated generically, would directly govern *both* situations:

A student should not sign a year's lease where the student cannot live in the leased property during the summer and where a nearly free alternative is available.

The determinative facts, the issue, the holding, and the rule are all dependent on each other. In the apartment hypothetical, if the issue were different — say, "How shall I respond to an offer to join the American Automobile Association?" — the

selection of determinative facts would also change. (In fact, the only determinative one would be fact I: “You neither own nor have access to a car.”) You’ll often find yourself using what the court tells you about the issue or the holding to fill in what the court hasn’t told you about the determinative facts, and vice versa.

For example, if the court states the issue but doesn’t identify the rule or specify which facts are determinative, you might discover the rule and the determinative facts by answering the following questions:

1. Who is suing whom over what series of events and to get what relief?
2. What issue does the court say it intends to decide?
3. How does the court decide that issue?
4. On what facts does the court rely in making that decision?
5. What rule does the court enforce?

In answering the fifth question, use the same kind of reasoning we applied to the apartment hypothetical: Develop several different phrasings of the rule (broad, narrow, middling) and identify the one the court is most likely to have had in mind.

Exercise II

Analyzing the Meaning of *Roberson v. Rochester Folding Box Co.*

What was the issue on appeal in *Roberson*? What rule did the appellate court enforce? What were the determinative facts?

§3.3 The Anatomy of a Statute

The *Roberson* decision was so unpopular that the following year the New York legislature enacted a statute providing exactly the relief that the *Roberson* court held was unavailable under the common law. The *Roberson* majority understood that that might happen. Recall the majority’s words: “The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.” The statute has been amended several times. Here is its current form:

New York Civil Rights Law §§ 50 – 51

§ 50. Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.

§ 51. Action for Injunction and for Damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in § 50] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by [§ 50], the jury, in its discretion, may award exemplary damages. . . .

A statute expresses rules the legislature has enacted. It does nothing else. Unlike judicial opinions, statutory text on its face contains no stories. Usually a statute does not explain the legislature's reasoning. Typically the explanations are in other documents, such as legislative committee reports. Most statutes are pure rules, structured as Chapter 2 describes. Sometimes those rules are straightforward, like the one in § 50 above. Sometimes they are convoluted like the one in § 51.

Exercise III Analyzing the Meaning of §§ 50 and 51 of the New York Civil Rights Law

Reading §§ 50 and 51 together as a single statute, what do they prohibit or require? If a person subject to New York law were to violate this prohibition or requirement, what might be the consequences? In what ways did §§ 50 and 51 change the rule of *Roberson*?

§3.4 How Statutes and the Common Law Interact

The common law has grown to include four separate invasion of privacy torts, and many states recognize all four of them. *Intrusion upon seclusion* is invasion of a person's private space—for example, by opening his mail or by spying through his windows with binoculars. *Public disclosure of private facts* is the dissemination of facts that don't legitimately concern the public and that are sufficiently private that a reasonable person would consider their disclosure highly offensive. *False light* is the dissemination of facts that, even if true, create a misleading and highly offensive impression about a person. *Appropriation of name or likeness* is what happened to Abigail Roberson.

The Court of Appeals held in *Roberson* that no common law right to privacy of any kind existed in New York. Section 51 of the New York Civil Rights Law created a statutory cause of action for appropriation. But no legislation in New

York has created a statutory cause of action for intrusion, public disclosure of private facts, or false light.

Because the legislature created a statutory cause of action *only* for appropriation, *Roberson* is still the law in New York on the other three invasion of privacy torts. If a plaintiff sues in New York for intrusion, public disclosure of private facts, or false light, that plaintiff will lose. A court will hold that those common law torts don't exist in New York, citing *Roberson*, and that New York recognizes only appropriation.

A statute does only what its words express. Sections 50 and 51 are narrowly drafted, and they only create a misdemeanor and a cause of action for appropriation. The following case illustrates that.

COSTANZA v. SEINFELD

181 Misc. 2d 562, 693 N.Y.S.2d 897

(Sup. Ct., N.Y. County 1999)

HAROLD TOMKINS, J.

A person is seeking an enormous sum of money for claims that the New York State courts have rejected for decades. This could be the plot for an episode in a situation comedy. Instead, it is the case brought by plaintiff Michael Costanza who is suing the comedian, Jerry Seinfeld, Larry David (who was the cocreator of the television program "Seinfeld"), the National Broadcasting Company, Inc. and the production companies for \$100 million. He is seeking relief for violation of New York's Civil Rights Law §§50 and 51. . . .

The substantive assertions of the complaint are that the defendants used the name and likeness of plaintiff Michael Costanza without his permission, that they invaded his privacy, [and] that he was portrayed in a negative, humiliating light. . . . Plaintiff Michael Costanza asserts that the fictional character of George Costanza in the television program "Seinfeld" is based upon him. In the show, George Costanza is a long-time friend of the lead character, Jerry Seinfeld. He is constantly having problems with poor employment situations, disastrous romantic relationships, conflicts with his parents and general self-absorption.

. . . Plaintiff Michael Costanza points to various similarities between himself and the character George Costanza to bolster his claim that his name and likeness are being appropriated. He claims that, like him, George Costanza is short, fat, bald, that he knew Jerry Seinfeld from college purportedly as the character George Costanza did and they both came from Queens. Plaintiff Michael Costanza asserts that the self-centered nature and unreliability of the character George Costanza are attributed to him and this humiliates him.

The issues in this case come before the court [through] a preanswer motion to dismiss. . . . [P]laintiff Michael Costanza's claims for being placed in a false light and invasion of privacy must be dismissed. They cannot stand because New York law does not and never has allowed a common-law claim for invasion of privacy, *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993);

Freihofer v. Hearst Corp., 65 N.Y.2d 135 (1985). As the New York Court of Appeals explained,

While legal scholarship has been influential in the development of a tort for intentional infliction of emotional distress, it has had less success in the development of a right to privacy in this State. In a famous law review article written more than a century ago, Samuel Warren and Louis Brandeis advocated a tort for invasion of the right to privacy. . . . Relying in part on this article, Abigail Marie Roberson sued a flour company for using her picture, without consent, in the advertisement of its product (*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538). Finding a lack of support for the thesis of the Warren-Brandeis study, this Court, in a four to three decision, rejected plaintiff's claim.

The *Roberson* decision was roundly criticized. . . . The Legislature responded by enacting the Nation's first statutory right to privacy (L. 1903, ch. 132), now codified as sections 50 and 51 of the Civil Rights Law. Section 50 prohibits the use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent. . . . Section 50 provides criminal penalties and section 51 a private right of action for damages and injunctive relief.

Howell at 122-123. In New York State, there is [still] no common law right to privacy, *Freihofer v. Hearst Corp.* at 140, and any relief must be sought under the statute.

The court now turns to the assertion that plaintiff Michael Costanza's name and likeness are being appropriated without his written consent. This claim faces several separate obstacles. First, defendants assert that plaintiff Michael Costanza has waived any claim by [personally] appearing on the show. [This defense fails because the] statute clearly provides that written consent is necessary for use of a person's name or likeness, *Kane v. Orange County Publs.*, 232 A.D.2d 526 (2d Dept. 1996). However, defendants note the limited nature of the relief provided by Civil Rights Law §§ 50 and 51. It extends only to the use of a name or likeness for trade or advertising, *Freihofer v. Hearst Corp.*, at 140. The sort of commercial exploitation prohibited and compensable if violated is solicitation for patronage, *Delan v. CBS, Inc.*, 91 A.D.2d 255 (2d Dept. 1983). In a case similar to this lawsuit involving the play "Six Degrees of Separation," it was held that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade,'" *Hampton v. Guare*, 195 A.D.2d 366 (1st Dept. 1993). The *Seinfeld* television program was a fictional comedic presentation. It does not fall within the scope of trade or advertising. . . .

Plaintiff Michael Costanza's claim for violation of Civil Rights Law §§ 50 and 51 must be dismissed. . . .



INTRODUCTION TO LEGAL WRITING

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Predictive Writing

§4.1 How Predictive Writing Differs from Persuasive Writing

Predictive writing and persuasive writing are *decisional*—but in different ways. In predictive writing, you help your reader—a supervising lawyer or your client—make a decision. In persuasive writing, you try to convince a judge to decide a case in favor of your client.

Predictive writing: A newspaper might ask its lawyer whether an article it wants to publish would make the newspaper liable for defamation, which is the tort of communicating damaging falsehoods about a person. This article describes certain people in unflattering ways, and the newspaper worries about whether it has gone too far. The newspaper might ask, “Is the article defamatory?” That’s the same as asking, “If we publish the article, will a court hold us liable for defamation?” Regardless of how the question is put, the only way a lawyer can answer is to predict what a court would do. The article is defamatory if a court would hold the newspaper liable for defamation. If a court would not do that, the article is not defamatory.

The newspaper asks the question so it can decide whether to publish the article. If the lawyer says the article is defamatory, the newspaper might ask a follow-up question: “How can the article be changed so that it isn’t defamatory?” The lawyer might answer, “It won’t be defamatory if you delete the fourth sentence.” The lawyer predicts to help the client make a decision.

After the article is published, a person mentioned in it consults her lawyer and asks what her rights are. Regardless of how the client phrases the question,

she is really asking, “If I sue the newspaper, will a court award me damages for defamation?” The lawyer’s prediction will help her decide whether to sue.

Predictive writing is neutral and objective. If the client will lose in court, good predictive writing should say that even though the client will be disappointed. The best predictions are accurate ones.

Persuasive writing: Here a lawyer explains to a court why it should make rulings the lawyer’s client wants. Persuasive writing is not neutral. It is advocacy. The court’s decision will determine who wins and who loses. Good persuasive writing *influences* the court to decide in favor of the lawyer’s client.

§4.2 The Documents Lawyers Write

Predictive writing is often done in office memoranda (which are explained in Chapter 16), professional emails (Chapter 17), and client letters (Chapter 18).

Persuasive writing is often done in trial court motion memoranda (Chapter 25) and in appellate briefs (Chapters 28–32). Chapters 23–24 and 26–27 explain how to make persuasive arguments and tell a client’s story persuasively in writing.

Many skills are common to both predictive and persuasive writing. They include working with statutes, cases, and other authority (Chapters 7–9); working with facts (Chapter 10); organizing written analysis (Chapters 11–14); as well as paragraphing, style, and quoting (Chapters 20–22).

Lawyers write a wide range of other documents as well: contracts, wills, pleadings, motions, interrogatories, affidavits, stipulations, judicial opinions, orders, judgments, statutes, administrative regulations, and more. But those documents usually aren’t covered in a first-year writing course. They’re covered instead in second- or third-year drafting courses.

§4.3 How to Predict

The prophecies of what the courts will do in fact, and nothing more pre-tentious, are what I mean by the law.

— Oliver Wendell Holmes

Let’s take up Welty’s facts from Chapter 2. Here they are again:

Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is listening to a

Black Keys album with his new four-foot concert speakers. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of burglary?

(Before continuing here, you should review §2.2 in Chapter 2 on how legal rules are structured.)

Assume that in your state the crime of common law burglary has been codified and renamed burglary in the first degree:

Criminal Code § 102: A person commits burglary in the first degree by breaking and entering the dwelling of another in the nighttime with intent to commit a felony inside.

Also assume that the elements of burglary in the first degree have been statutorily defined as follows:

Criminal Code § 101(c): A "breaking" is the making of an opening, or the enlarging of an opening, so as to permit entry into a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto.

Criminal Code § 101(d): An "entering" or an "entry" is the placing, by a defendant, of any part of his body or anything under his control within a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto.

Criminal Code § 101(e): A "closed off portion" of a building is one divided from the remainder of the building by walls, partitions, or the like so that it can be secured against entry.

Criminal Code § 101(f): A "dwelling" is any building, or any closed off portion thereof, in which one or more persons habitually sleep.

Criminal Code § 101(g): A dwelling is "of another" if the defendant does not by right habitually sleep there.

Criminal Code § 101(h): "Nighttime" is the period between sunset and sunrise.

Criminal Code § 101(k): "Intent to commit a felony inside" is the intent to commit, while inside a building or closed off portion of a building, a crime classified in this Code as a felony, but only if the defendant had that intent at the moment the defendant broke and entered.

And assume that the legislature has also enacted the following:

Criminal Code § 11: No person shall be convicted of a crime except on evidence proving guilt beyond a reasonable doubt.

Criminal Code § 403: An assault causing substantial injury is a felony.

Finally, assume — for the sake of simplicity — that none of these sections has yet been interpreted by the courts, and that you are therefore limited to the statute itself. (That is an unusual situation. More often, you will also be working with judicial decisions that have interpreted the statute.)

If you were Welty's lawyer and must predict whether Welty will be convicted of first-degree burglary, you might think about it in the following way. (*What you say to yourself is shown in the box below.*)

First-degree burglary has six elements and no exceptions. Welty will be guilty if the prosecutor proves every element beyond a reasonable doubt. I'll make a list of the elements and annotate it by writing next to each element the relevant facts.

[You start making notes while continuing talking to yourself silently.]

It's an apartment. Lutz lives there. Welty doesn't.

[In your notes, you put a checkmark next to the "dwelling" element and another checkmark next to the "of another" element. The checkmarks mean that you believe the prosecutor can prove those elements.]

It was midnight.

[Next to the "nighttime" element, you write "midnight" and add a checkmark. The prosecutor can obviously prove that element.]

When Welty pushed the door back, she enlarged an opening. Neither Lutz nor the landlord (the owner) told her that she had permission.

[In your notes, you write three facts next to the "breaking" element:

*Welty pushed door open
no permission from Lutz
no permission from owner/landlord*

Then you put a checkmark next the breaking element because the prosecutor can prove it.]

She entered when she walked in. Neither Lutz nor the landlord (the owner) told her that she had permission to be inside.

[Next to the “entering” element you write that Welty walked in without permission. And you add a checkmark because the prosecutor can prove she entered.]

What she did next, punching Lutz, is a felony. But under § 101(k), the intent-to-commit-a-felony element isn’t satisfied unless — at the moment she pushed the door open and walked in — she already had the intent to hit him. She was furious. But before the punch, Lutz had turned on her and ordered her to leave. She’ll testify that she “found this to be too much.” That creates reasonable doubt about whether, at the moment she opened the door and walked in, she already had the intent to strike him. She may have been angry when she pushed the door open and walked in. But anger doesn’t necessarily include intent to assault somebody. Most of the anger that people feel in life isn’t followed by violence.

[You look at your notes. Next to the intent-to-commit-a-felony element, you write these facts:

*angry when came in
Lutz ordered her out
will testify that was “too much”
only then did she punch him*

But you don’t write a checkmark.]

The prosecutor can’t prove the intent-to-commit-a-felony element beyond a reasonable doubt.

[You have a good argument for acquitting Welty of burglary.]

To *write* your prediction, you might produce something like the left column below. In the right column are our comments on the writing and how it is organized. Pay close attention to the organization, which matters a great deal in legal writing.

§4.3

The prosecution cannot prove all the elements of first degree burglary in Welty's case.

Under § 102 of the Criminal Code, the elements of first degree burglary are (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) "with intent to commit a felony inside." Under § 11, a defendant can be convicted only "on evidence proving guilt beyond a reasonable doubt." Although Welty broke and entered Lutz's dwelling in the nighttime, and although the assault she committed there is classified as a felony by § 403, the evidence does not prove beyond a reasonable doubt that she had the intent to assault Lutz when she broke and entered.

Section 101(k) defines "intent to commit a felony inside" as "the intent to commit, while inside a building or closed off portion of a building, a crime classified in this Code as a felony, but only if the defendant had that intent at the moment the defendant broke and entered." When Lutz turned around and ordered her to leave, she had been complaining about his noise. She says that she found his ordering her out to be "too much" and punched him. A reasonable explanation is that she entered the apartment to complain and, after she was already in the room, decided to punch him. Section 101(k) requires that, when she walked through the door, she intended to punch him. The prosecution would have to prove that beyond a reasonable doubt. But no words or action on her part show that she when she walked through the door she intended to punch Lutz.

Welty's pushing open Lutz's apartment door was, however, a breaking, which § 101(c) defines as "the making of an opening, or the enlarging of an opening, so as to permit entry into a building, or a closed off portion of a building,

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This is your bottom-line conclusion.

Section 102 is the basic rule governing the dispute.

Section 11 operates together with § 102.

This is a roadmap sentence telling the reader the route your analysis will follow.

The determinative issue is addressed before the other elements. Why consider *at the beginning* an element that the statute lists *last*? (Reread § 102.) The reason is that if one element is unprovable, that element becomes the most important one. Welty can be convicted only if *all* the elements are proved. If one element can't be proved, that element is the most important one because it makes her not guilty.

Why bother to consider the other elements at all? The reason is that you might be wrong about the element you think is dispositive, and the reader is entitled to a full accounting.

if neither the owner nor the occupant has consented thereto.” Lutz’s apartment is a “closed off portion” of a building, which is defined by § 101(e) as “one divided from the remainder of the building by walls, partitions, or the like so that it can be secured against entry.” It is difficult to imagine an apartment that is not divided from the rest of the building in which it is located. Lutz opened his front door about six inches after Welty knocked on it to complain of noise, and, when she walked into his apartment, he immediately ordered her out. His opening the door by six inches would not have been enough to let Welty in, and Lutz’s prompt order to leave shows that he had not consented to her opening the door farther. And nothing suggests that Welty had consent from the landlord who owns the apartment.

Welty’s walking into Lutz’s apartment was an entry, which § 101(g) defines as “the placing, by a defendant, of any part of his body or anything under his control within a building, or a closed off portion of a building, if neither the owner nor the occupant has consented thereto.” Welty walked into Lutz’s apartment, and the circumstances do not show consent to an entry for the same reasons that they do not show consent to a breaking.

The prosecution can also prove the other elements beyond a reasonable doubt. Lutz’s apartment is a dwelling, which § 101(f) defines as “any building, or closed off portion thereof, in which one or more persons habitually sleep.” Lutz will testify that he habitually sleeps in his apartment. To Welty, that apartment is the dwelling of another, as defined by § 101(n), because she does not habitually sleep there. Finally, these events happened at midnight and within § 101(m)’s definition of nighttime.

This paragraph begins with your conclusion on the breaking issue, followed by the rule defining a breaking, and an application of the rule to the facts. This is a natural sequence in legal writing. State your conclusion. Then state the rule. Then apply the rule to the facts. Later chapters in this book expand that sequence and explain how to make it work.

This paragraph is structured like the preceding one, except that for economy it incorporates by reference the parallel analysis set out earlier.

These elements are so straightforward that a reader will quickly agree that the prosecution can prove all of them. You must account for them. But they aren’t dispositive, and the analysis can be compressed.

Exercises Nansen and Byrd

Exercise A. With the aid of §§ 16 and 221(a) of the Criminal Code (below), break down the rule in § 220 into a list of elements and exceptions. Annotate the list by adding definitions for the elements (and for any exceptions you might come across). Under each element you list, leave lots of white space. When you do the second part of this exercise, you will need room to write more.

Criminal Code § 16: When a term describing a kind of intent or knowledge appears in a statute defining a crime, that term applies to every element of the crime unless the definition of the crime clearly indicates that the term is meant to apply only to certain elements and not to others.

Criminal Code § 220: A person is guilty of criminal sale of a controlled substance when he knowingly sells any quantity of a controlled substance.

Criminal Code § 221(a): As used in section 220 of this code, “sell” means to exchange for goods or money, to give, or to offer or agree to do the same, except where the seller is a licensed physician dispensing the controlled substance pursuant to a permit issued by the Drug Enforcement Commission or where the seller is a licensed pharmacist dispensing the controlled substance as directed by a prescription issued by a licensed physician pursuant to a permit issued by the Drug Enforcement Commission.

Exercise B. You’ve interviewed Nansen, who lives with Byrd. Neither is a licensed physician or a licensed pharmacist. At about noon on July 15, both were arrested and charged with criminal sale of a controlled substance. Nansen has told you the following:

Byrd keeps a supply of cocaine in our apartment. He had been out of town for a month, and I had used up his stash while he was gone. I knew that was going to bend Byrd completely out of shape, but I thought I was going to get away with it. I had replaced it all with plaster. When you grind plaster down real fine, it looks like coke. For other reasons, I had decided to go to Alaska on an afternoon flight on July 15 and not come back. Byrd was supposed to get back into town on July 16, and by the time he figured out what had happened, I’d be in the Tongass Forest.

But on the morning of the 15th, Byrd opened the door of the apartment and walked in, saying he had decided to come back a day early. I hadn’t started packing yet—I wouldn’t have much to pack anyway—but I didn’t know how I was going to pack with Byrd standing around because of all the explaining I’d have to do. I also didn’t want Byrd hanging around the apartment and working up an urge for some cocaine that wasn’t there. So I said, “Let’s go hang out on the street.”

We had been on the sidewalk about ten or fifteen minutes when a guy came up to us and started talking. He was dressed a little too well to be a regular street person, but he looked kind of desperate. I figured he was looking to buy some drugs. Then I realized that that was the solution to at least some of my problem.

I took Byrd aside and said, "This guy looks like he's ready to buy big. What do you think he'd pay for your stash?" Byrd looked reluctant, so I turned to the guy and said, "We can sell you about three ounces of coke, but we have to have a thousand for it." When the guy said, "Yeah," Byrd said, "Wait here" and ran inside the apartment building. A thousand was far more than the stuff was worth.

Byrd walked out onto the stoop with the whole stash in his hand in the zip-lock bag he kept it in. While he was walking down the steps, about ten feet away from me and the guy who wanted to buy, two uniforms appeared out of nowhere and arrested Byrd and me.

The "guy" turned out to be Officer D'Asconni, an undercover policeman who will testify to the conversation Nansen has described. The police laboratory reports that the bag contained 2.8 ounces of plaster and 0.007 ounces of cocaine. When you told Nansen about the laboratory report, he said the following:

I didn't think there was any coke in that bag. What they found must have been residue. I had used up every last bit of Byrd's stuff. I clearly remember looking at that empty bag after I had used it all and wondering how much plaster to put in it so that it would at least look like the coke Byrd had left behind. I certainly didn't see any point in scrubbing the bag with cleanser before I put the plaster in it.

With the aid of Criminal Code § 221(b) (below), finish annotating your list of elements by writing, under each element, the facts that are relevant to that element.

Criminal Code § 221(b): As used in section 220, "controlled substance" includes any of the following: . . . cocaine . . .

Exercise C. You've been asked to determine whether Nansen or Byrd is likely to be convicted of criminal sale of a controlled substance. The question isn't whether Nansen or Byrd criminally sold a controlled substance, but whether either of them is likely to be convicted of doing that. To make that prediction, take into account § 10(a) of the Criminal Code.

Criminal Code § 10(a): No person shall be convicted of a crime except on evidence proving guilt beyond a reasonable doubt.

Using your annotated outline of elements, decide whether each element can be proved beyond a reasonable doubt, and whether any exceptions are satisfied. Then make your prediction. Finally, decide the order in which the elements would best be explored in the Discussion section of an office memo.